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No. 99-1353

IN THE

Supreme Court of the United States

FRIZZELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

GATLINBURG, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

REPLY BRIEF FOR PETITIONER

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1. While it tries to conjure up various reasons not to resolve it, respondent does not deny the basic conflict giving rise to this petition: in a case involving a dispute arising under the same form contract subject to the Federal Arbitration Act ("FAA"), the federal courts will—and, indeed, under this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995), *must*—enforce the parties' agreement to arbitrate "all claims or disputes" arising under the contract regardless of any contrary state law rule, while the Tennessee Supreme Court will—in direct conflict with *Mastrobuono* and numerous other federal and state court decisions—refuse to enforce that agreement with respect to claims that are not arbitrable under state law. Same FAA contract. Same claim. But "necessarily different" result (Opp. at 15), depending on whether the case is in

federal or state court. The FAA was enacted to prevent just this sort of dichotomy, *see* Pet. 17, and this Court should grant certiorari to eliminate it here.

2. While respondent does not deny that the contract in this case is governed by the FAA, it nevertheless argues that this Court lacks jurisdiction to review the Tennessee Supreme Court judgment refusing to enforce the parties' agreement to arbitrate "[a]ll claims, disputes and or other matters" arising out of the contract. Pet. App. at 2a. Respondent is wrong.

a. Just as in *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 473 n.4 (1989), petitioner here "explicitly drew in question the validity of [the pertinent state arbitration statute] on federal grounds, contending that the statute, as applied [to defeat the parties' agreement to arbitrate], was pre-empted by the FAA and thus invalid under the Supremacy Clause." *See* Appellant's Br. in Tenn. S. Ct. at 22 ("Frizzell argues that the [FAA] and federal substantive law interpreting the FAA pre-empts inconsistent Tennessee law"), 31 ("Frizzell urges this Court to find that * * * the FAA pre-empts Tennessee state law, and in particular Tennessee's Arbitration Act"); *accord* at 19-22, 35. Indeed, an entire *section* of petitioner's brief below was devoted to the argument that the FAA preempts conflicting Tennessee law providing for the adjudication rather than arbitration of fraudulent inducement claims. *See id.* at 26-32; *see also* Appellant's Reply Br. in Tenn. S. Ct. at 6-11 (same). In

the face of this record, the suggestion that no federal argument was raised below is altogether specious.[1]

This leaves respondent's argument that this Court lacks jurisdiction because the Tennessee Supreme Court chose—a skeptic might say, not unintentionally—to ignore petitioner's federal preemption argument and, instead, bury its holding that the conflicting Tennessee statute governed the arbitration dispute in this case in a purported interpretation of the contract. *See* Opp. at 5-11. But *Volt* answers this claim, too. There is no requirement that the state court judgment "directly address the validity of the [conflicting state] statute itself." 489 U.S. at 473 n.4. Rather, this Court has jurisdiction to

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[1] Petitioner cited the conflicting Tennessee statute—"Tenn. Code Annot. § 29-5-301 *et seq.*," Tenn. S. Ct. Br. at 21—by title and, indeed, even appended a copy of it to its brief. Petitioner also explained that *City of Blaine* v. *John Coleman Hayes & Assocs., Inc.*, 818 S.W.2d 33, 38 (Tenn. Ct. App. 1991), interpreted the Tennessee Uniform Arbitration Act ("TUAA") to require "a judicial determination on the issue" of fraud in the inducement of a contract, expressly disagreeing with the contrary FAA rule adopted in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 400 (1967). *See* Tenn. S. Ct. Br. at 19-21. The courts below also acknowledged the conflict between the TUAA and FAA. *See* Pet. App. at 8a n.10; *id.* at 17a-18a.

Likewise, the petition plainly states the basic conflict between federal and state law giving rise to the question presented by this case. There is scarcely a page of the petition that does not discuss this conflict; the petition begins by setting forth the Supremacy Clause (Pet. at 2); and, in particular, the petition explains that under *Blaine*—which was adopted by the Tennessee Supreme Court below—the "Tennessee Arbitration Act" requires adjudication of fraudulent inducement claims—in direct conflict with the FAA rule recognized in *Prima Paint*. Pet. at 6 n.1. *See id.* at 11.

review a state court judgment applying state law "against the contention that such application is invalid on federal grounds, regardless of the particular grounds or reasons on which [the state court's] decision is put." *Id.* (citations omitted; brackets in original). Significantly, the *Volt* Court further held that this jurisdictional rule applies "*even though the [state] court's decision may have been premised on its interpretation of the contract.*" *Id.* (emphasis added). Respondent takes a stab at distinguishing *Volt* on the ground that "[p]etitioner [here] did not bring any state statute into question on federal grounds." Opp. at 7 n.1. But, as explained, that statement is utterly refuted by the record.

b. None of this should come as a surprise. If respondent's understanding of this Court's jurisdiction were correct, an enormous loophole would be opened to the enforcement of federal rights. State courts would be free to extinguish federal rights—including the "national substantive law" established by the FAA, *Prima Paint*, 388 U.S. at 400, to "revers[e] centuries of judicial hostility to arbitration agreements," *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 225 (1987) (citation omitted)—simply by purporting to ground their decisions in state law, taking comfort in the fact that their decisions would be unreviewable in this Court. But as established in *Volt* and the other cases in which this Court has found jurisdiction to review state court decisions interpreting FAA contracts in a manner that frustrates federal arbitration law,[2] this is not the law.

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[2] *See also, e.g.*, *Perry* v. *Thomas*, 482 U.S. 483, 489 n.7 (1987) (Section 1257 confers jurisdiction to review state court judgment refusing to enforce agreement in FAA contract to arbitrate all

Review of a decision rejecting a claim of federal preemption can hardly be blocked by the lower court's reliance on the very state law claimed to be preempted.[3]

3. When it comes to the merits, respondent also seeks cover in state law—and state law alone—arguing that the Tennessee Supreme Court was free to interpret the arbitration agreement as it saw fit, "according to Tennessee law." Opp. at i, 11. But in doing so, respondent merely joins issue on the basic question presented—whether in refusing to enforce the parties' arbitration agreement, the state court improperly displaced federal arbitration law with conflicting state law.

a. The FAA establishes a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); Pet. at 3. *See also, e.g.*, *Smith Barney, Inc.* v. *Critical Health Sys. of N.C., Inc.*, __ F.3d __, 2000

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claims or disputes arising under contract, due to conflicting state law); *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984) (Section 1257 confers jurisdiction to review state court judgment where "the effect of the judgment * * * is to nullify a valid [FAA] contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration").

[3] The Court's treatment of the jurisdictional issue in *Volt* and cases cited in note 2, *supra*, also disposes of respondent's related suggestion that the decision below rests on an independent and adequate state law ground. *See* Opp. at 8. This argument is also refuted by the longstanding rule that "independent and adequate state ground" doctrine does not divest this Court of jurisdiction "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter." *Enterprise Irrigation Dist.* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

WL 572470, at *4 n.1 (4th Cir. 2000) ("arbitration contracts [subject to FAA] must be construed in accordance with federal law"). Of course, under the FAA "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. But in construing arbitration agreements subject to the FAA, courts nevertheless remain bound by the "body of federal substantive law of arbitrability." *Moses H. Cone*, 460 U.S. at 24. *See Southland Corp.* v. *Keating*, 465 U.S. at 12 (emphasizing that this "substantive law" is "applicable in state and federal court").

One of the federal rules governing arbitration agreements subject to the FAA is that a general choice-of-law provision should *not* be interpreted to incorporate state law that would defeat the parties' agreement to arbitrate all claims or disputes arising under the contract. That is the teaching of *Mastrobuono*, which involved the interpretation of an FAA contract with virtually identical choice-of-law and arbitration provisions, *see* Pet. at 8-13; it follows directly from *Ferro Corp.* v. *Garrison Industries, Inc.*, 142 F.3d 926 (6th Cir. 1998), which is on all fours with this case, *see* Pet. at 14-17; and it is reaffirmed by the numerous other federal and state court decisions discussed in our petition. *See id.* at 17-23. Indeed, since the filing of this petition, still more decisions have been issued that acknowledge and heed this important federal rule of law. *See, e.g., Smith Barney, Inc.*, __ F.3d at __, 2000 WL 572470, at *4 n.1.[4]

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[4] The rule of *Mastrobuono* may also be explained in terms of the federal mandate that in construing FAA contracts ambiguities should be resolved in favor of arbitration. *See* Pet. at 10-11 (discussing *Mastrobuono*); *Moses H. Cone*, 460 U.S. at 24-25

b. The decision below directly conflicts with this growing body of precedent, and respondent has almost nothing to say in response. With respect to *Ferro* and the other lower court decisions discussed in the petition, respondent replies that those decisions "are not binding on the Tennessee Supreme Court." Opp. at 15. But of course, that is true with respect to any conflict among the lower courts; this Court grants certiorari to resolve such conflicts to ensure that federal law is uniformly enforced across the land. *See* S. Ct. Rule 10(b). Respondent also asserts that "other federal circuits, federal district courts and state courts have rendered decisions consistent with the Tennessee Supreme Court decision." Opp. at 15. But of course, that only underscores the entrenched nature of the conflict. *See id.* at 15-16 n.2.

Respondent's effort to deal with *Mastrobuono* is no more availing. Without identifying a single difference between the contract in this case and the one in *Mastrobuono*, respondent suggests that this case is distinguishable because the Tennessee Supreme Court "construed the arbitration clause and the Tennessee choice-of-law clause to mean that the parties intended to submit all disputes to arbitration *to the extent permitted by state law*," Opp. at 14-15 (emphasis added)—precisely the result that this Court found "untenable" in *Mastrobuono*. 514 U.S. at 64. But unless the Tennessee Supreme

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("The [FAA] establishes that, *as a matter of federal law*, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "the problem at hand is the construction of the contract language itself.") (emphasis added); *Jeereddi A. Prasad, M.D., Inc.* v. *Investors Assocs., Inc.*, 82 F. Supp. 2d 365, 369-370 (D.N.J. 2000) (discussing *Mastrobuono*).

Court is free to disregard the rule of *Mastrobuono*—the basic question presented here—the fact that the Tennessee high court would interpret the *same* FAA contract differently—and thereby incorporate state law abrogating the parties' agreement to arbitrate *all* claims arising under the contract—is not a distinction that should allow for the displacement of federal law. If anything, it simply underscores the need for this Court's review to safeguard the important federal interests at stake.[5]

c. Respondent also argues that this case is governed by *Volt*, not *Mastrobuono*. *See* Opp. at 12-14. As we have explained (Pet. at 21-23), a good reason to grant certiorari here is to resolve the deepening conflict and confusion that exists in the lower courts over the significance of *Volt* in the wake of *Mastrobuono*. This case provides an ideal vehicle to do so, and to reaffirm that the substantive federal law of arbitration extends with equal force—just like every other arm of federal law—to the state courts. In any event, as we also explained (Pet. at 13), *Volt* is readily distinguishable from this case and *Mastrobuono*: in *Volt* this Court upheld a state court decision holding that a general choice-of-law provision incorporated state procedural rules that "generally *foster[ed]* the federal policy favoring arbitration,"

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[5] Respondent also tries to distinguish *Mastrobuono* on the ground that it involved "a New York statute," whereas "[t]here is no Tennessee statute at issue in this case." Opp. at 14. It is not apparent why this distinction should make any difference, but in any event the conflicting state law in *Mastrobuono* was a ruling of "the New York Court of Appeals * * * that in New York the power to award punitive damages is limited to judicial tribunals and may not be exercised by arbitrators." 514 U.S. at 55. As explained, the conflicting state law here is the TUAA.

489 U.S. at 476 & n.5 (emphasis added), whereas this case and *Mastrobuono* concern whether a general choice-of-law provision incorporates state law that, if given effect, would directly *contravene* the federal policy favoring arbitration. *See* Pet. at 13. Respondent never even addresses this basic distinction.

4. Contrary to the suggestion of respondent (Opp. at 16-19), the decision below assuredly does *not* promote the policies underlying the FAA. Just the opposite. The Tennessee Supreme Court invoked conflicting state law to abrogate the parties' agreement to arbitrate *all* claims or disputes arising out of their contract. The decision below therefore evidences just the sort of "judicial hostility to arbitration agreements" that led to the enactment of the FAA. *Shearson/American Express*, 482 U.S. at 225-226. *See also Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate."). At the same time, the decision below makes the federal "right to enforce an arbitration contract * * * dependent for its enforcement on the particular forum in which it is asserted," *Southland Corp.* v. *Keating*, 465 U.S. at 15, again frustrating Congress' intent. *See Allied-Bruce Terminix*, 513 U.S. at 272 ("Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitrations in similar cases."); Pet. at 17.

5. Finally, the fleeting suggestion that this case is not of general importance (Opp. at 19) is resoundingly answered by the brief of the Associated General Contractors of America, Inc. ("AGC") in support of certiorari. Thousands of AGC's members—engaged in

myriad projects across the land—rely on standard form contracts just like the one at issue here to guarantee that disputes will be resolved by arbitration. AGC Br. at 8. These contracts—most of which are subject to the FAA—"seek to bring uniformity and predictability to the business and legal transactions attending to the construction business." *Id.* at 8-9. The Tennessee Supreme Court decision in this case "effectively thwarts this objective," "will serve as a basis for other state courts to undermine the national policy of the FAA," and, thus, creates enormous uncertainty as to the enforceability of hundreds if not thousands of existing arbitration agreements across the country. *Id.* at 9.

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For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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